Nos. 07-36039, 07-36040

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS, INC., doing business as Ralph's Thriftway, et al.,

Plaintiffs-Appellees,

v.

MARY SELECKY, Acting Secretary of the
Washington State Department of Health, et al.,

Defendants-Appellants.

and

JUDITH BILLINGS, et al.,

Defendants-Intervenors-Appellants

On Appeal from the Western District of Washington, No. 07-05374

AMICUS CURIAE BRIEF OF CURRENT WASHINGTON STATE LEGISLATORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE W.D. OF WASHINGTON

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This *Amicus Curiae* brief is filed on behalf of a bipartisan group of Washington State Senators and Representatives. *Amici* include **Senators Mark Schoesler** (R-9, Republican Floor Leader), **Mike Carrell** (R-28), **Jerome Delvin** (R-8), **James Hargrove** (D-24), **Pam Roach** (R-31), **Dan Swecker** (R-20), **Val Stevens** (R-39), and **Joseph Zarelli** (R-18); and **Representatives John Ahern** (R-6), **Bruce Chandler** (R-15), **Larry Crouse** (R-4), **Jim Dunn** (R-17), **Jaime Herrera** (R-18), **Bill Hinkle** (R-13), **Dan Kristiansen** (R-39), **Jim McCune** (R-2), **Mark Miloscia** (D-30), **Lynn Schindler** (R-4, Minority Whip), and **Bob Sump** (R-7). *Amici* believe that freedom of conscience is a fundamental right affirmed by the history and tradition of this nation.

As legislators, *Amici* have an interest in ensuring that the laws they pass—such as the conscience protection in WASH. REV. CODE § 9.02.150—are not undermined. *Amici* also have an interest in ensuring that fundamental rights affirmed by the United States Supreme Court are not diminished in the State of Washington.

Amici assert that the *Brief of Amici Curiae Philip Talmadge, et al.*, [hereinafter Talmadge Brief] is not demonstrative of the Washington State

[1] In accordance with Fed. R. App. P. 29, all parties consent to the filing of *amicus* briefs in this cause.

legislature as a whole. In fact, the ideas discussed in that brief run contrary to this nation's history and tradition, as well as to United States Supreme Court jurisprudence. In addition, the aversion to freedom of conscience expressed by the legislators represented therein—several of whom are no longer in office—runs contrary to the stated positions of national and international medical organizations. In short, that brief is demonstrative only of a minority position taken by those legislators, in the face of this nation's history, tradition, and continuing medical support for freedom of conscience.

Amici also demonstrate herein that the Talmadge Brief ignores the significant conscience protection afforded to all individuals as well as private corporations under WASH. REV. CODE § 9.02.150. Section 9.02.150 provides protection to Plaintiffs, and *Amici* have an interest in ensuring that this constitutional, commonsense law is enforced.

As legislators seeking to uphold the constitutional and statutory freedom of conscience in Washington, *Amici* request that this Court affirm the decision of the Western District of Washington.

SUMMARY OF ARGUMENT

Freedom of conscience is as celebrated as this nation is itself. Affirmed by our Founders, our Supreme Court, our state and federal legislatures, and national and international medical organizations, it is a freedom guaranteed to each of our citizens—including the Plaintiffs in this case.

Part I of this brief examines the history and tradition affirming freedom of conscience in our nation. First, freedom of conscience is as historic as the founding of this nation itself. In addition, the U.S. Supreme Court has, time and time again, affirmed the freedom of conscience of all U.S. citizens. From pledge recitation cases to military draft cases to abortion jurisprudence, the Supreme Court has made clear that state and federal governments may not require persons to commit acts that are violative of their consciences.

Moreover, state and federal legislatures—including Washington's legislature, in WASH. REV. CODE § 9.02.150—have further ensured this freedom by promulgating statutory laws protecting the conscience rights of healthcare providers. While ignored by Defendants and their *amici*, § 9.02.150 provides comprehensive protection to all persons in the State of Washington, as well as to private entities. Plaintiffs conscientious objection to the abortifacient effect of emergency contraception is protected under § 9.02.150.

Finally, Part I also summarizes the conscience protections affirmed by national and international medical organizations, including the American Pharmaceutical Association, the American Medical Association, and the World Medical Association. This commitment to freedom of conscience by medical organizations demonstrates the deep commitment the medical field has toward protecting its healthcare providers.

Part II dispels the myth propagated by Defendants and their *amici* that emergency contraception is not an "abortifacient." Contrary to these claims, both the Federal Drug Administration and the manufacturer of emergency contraception have admitted that emergency contraception possesses a mechanism of action that prevents a fertilized embryo from attaching to the uterine wall. Such a mechanism of action constitutes abortion according to the religious and conscientious beliefs of Plaintiffs and millions of other persons and organizations across the United States. The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* acknowledged that persons of good conscience can resolve the "life" issue differently. 505 U.S. 833, 850 (1992). Plaintiffs have resolved that life begins at conception—not at implantation. Plaintiffs must not be punished for this belief, held in good conscience.

Requiring Plaintiffs to dispense abortifacient contraception under Wash. Admin. Code §§ 246-863-095 and 246-869-010 in contravention of their beliefs is

violative of their fundamental freedom of conscience, granted to us by our Founders and affirmed by the Supreme Court, state and federal legislatures, and medical organizations. As such, this Court must affirm the holding of the Western District of Washington.

ARGUMENT

Freedom of conscience is a fundamental right that has been revered since the founding of our nation. It a historic right affirmed by our Founders, the United States Supreme Court, federal and state legislatures, including the legislature of the State of Washington, and medical organizations. In short, our history and tradition affirm that a person cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs.

The United States Supreme Court has stated that men and women of good conscience can disagree about the moral and spiritual implications of terminating a pregnancy. *Casey*, 505 U.S. at 850. The abortifacient effect of emergency contraception, which is discussed in Part II, places Plaintiffs directly under the ambit of this national dilemma. In fact, the ***manufacturer's admitted abortifacient effect*** of emergency contraception is objectionable to a large number of healthcare providers and provides ground for the Plaintiffs' conscientious objection to its provision.

I. FREEDOM OF CONSCIENCE IS A HISTORIC RIGHT STEEPED IN THE TRADITION OF THE UNITED STATES AND ITS CONSTITUTION

A. Freedom of Conscience is a Fundamental Right Affirmed by our Founders

The signers to the religion provisions of the First Amendment were united in a desire to protect the "liberty of conscience." Having recently shed blood to throw off a government which dictated and controlled their religion and practices, a government which guaranteed freedom of conscience was foremost in their hearts and minds.[2]

The most often quoted Founder and author of the Declaration of Independence, Thomas Jefferson, made it clear that freedom of conscience is not to be submitted to the government:

> [O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[3]

Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[4]

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[2] The Founders often used the terms "conscience" and "religion" synonymously. Thomas Berg, *Free Exercise of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 310 (2005). Thus, adoption of the "religion" clauses does not mean that the Founders were ignoring freedom of conscience. The two were inextricably intertwined.

[3] Thomas Jefferson, *Notes on Virginia* (1782).

Jefferson also maintained that forcing a person to contribute to a cause to which he or she abhorred was "tyrannical."[5] This belief formed the basis of Jefferson's bill in Virginia, which prohibited the compelling of a man to furnish money for the propagation of opinions to which he was opposed.[6] Jefferson—who considered it "tyrannical" to force a person to contribute monetarily to a position he disagreed with—would obviously be aghast at a law requiring a person to provide an actual service that is conscientiously objectionable to that person.

James Madison, considered the Father of the Bill of Rights—the same bill of rights protecting pharmacists today—was also deeply concerned that freedom of conscience of Americans be protected. In his infamous *Memorial and Remonstrance against Religious Assessments,* Madison stated:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right.*[7]

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[4] Thomas Jefferson, Letter to New London Methodists (1809).

[5] Julian P. Boyd, THE PAPERS OF THOMAS JEFFERSON 545 (1950) (quoting Jefferson, *A Bill for Establishing Religious Freedom*).

[6] Thus, not only is Jefferson the author of the Declaration of Independence, but he is also the author of one of this Nation's first statutes granting the right to refuse based upon conscience. Jefferson was so proud of this accomplishment that he had "Author of the … Statute of Virginia Religious Freedom…" etched on his gravestone.

[7] James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (1875) (emphasis added).

In fact, Madison described the conscience as "the most sacred of all property."[8] Madison also amended the Virginia Declaration of Rights to state that all men are entitled to full and free exercise of religion, "according to the dictates of conscience."

Madison understood that if man cannot be loyal to himself, to his conscience, then a government cannot expect him to be loyal to less compelling obligations or rules, statutes, judicial orders, and professional duties. If the government demands that he betray his conscience, the government has eliminated the only moral basis for obeying any law. Madison considered it "the particular glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated."[9]

Our first President, George Washington, maintained that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle," and he advised Americans to "labor to keep alive in your breast that little spark of celestial fire called conscience."[10] President Washington also maintained that the government should accommodate religious persons:

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[8] Buckner F. Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

[9] James Madison, Speech Delivered in Congress (Dec. 22, 1790).

[10] Michael Novak & Jana Novak, WASHINGTON'S GOD 111(2006); Milton, *supra*.

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.[11]

The enumeration of the Founder's commitment to freedom of conscience could go on and on. John Adams stated that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner most agreeable to the dictates of his own conscience."[12] Samuel Adams wrote that the liberty of conscience is an original right.[13]

Moreover, the freedom of conscience is not limited to "religious" mindsets. Indeed, it was conscience that inspired transcendentalists such as Emerson and Thoreau. Thoreau wrote:

> Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience then? I think that we should be men first, and subjects afterward…. The only obligation which I have a right to assume is to do at anytime what I think right.[14]

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[11] George Washington, Letter to the Religious Society Called Quakers (1879).

[12] John Adams, *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts,* in REPORT FROM COMMITTEE BEFORE THE CONVENTION OF DELEGATES (1779).

[13] Harry Alonzo Cushing, THE WRITINGS OF SAMUEL ADAMS 350-59 (vol. II, 1906).

[14] Henry David Thoreau, *Civil Disobedience* (1849).

Thoreau taught that each citizen has an obligation to disobey any law that requires him to violate his own conscience.

Forcing pharmacists to fill prescriptions to which they are conscientiously opposed guts the very purpose for which this nation was formed. As Thomas Jefferson charged us:

> [W]e are bound, you, I, every one, to make common cause, even with error itself, to maintain the common right of freedom of conscience. *We ought with one heart and one hand hew down the daring and dangerous efforts of those who would seduce the public opinion to substitute itself into … tyranny over religious faith….*"[15]

B. Freedom of Conscience is a Fundamental Right Affirmed by the United States Supreme Court

The First Amendment promises that Congress shall make no law prohibiting the free exercise of religion. U.S. Const. amend. I. At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.[16] This is evident not only from the Founders'

[15] Thomas Jefferson, Letter to Edward Dowse, Esq. (Apr. 19, 1803) (emphasis added).

[16] *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

intentions for this nation, as discussed above, but also by the U.S. Supreme Court's shaping of Free Exercise jurisprudence.[17]

The Supreme Court has stated that "***[f]reedom of conscience*** and freedom to adhere to such religious organization or form of worship as the individual may choose ***cannot be restricted by law***." *Cantwell v. Conn*., 310 U.S. 296, 303 (1940) (emphasis added). While the "freedom to believe" is absolute, the "freedom to act" is not; however, "in every case," regulations on the freedom to act cannot "unduly infringe the protected freedom." *Id*. at 303-04.

In the 1940s, the Court considered regulations requiring public school students to recite the pledge to the American flag. In 1940, the Court ruled against a group of Jehovah's Witnesses who sought to have their children exempted from reciting the pledge. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).[18]

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[17] The Court's decisions affirming freedom of conscience are too numerable to discuss here. Thus, a few examples must suffice.

[18] Even though *Gobitis* was ultimately decided incorrectly, Justice Frankfurter, writing the majority opinion, did expound upon the balance between the interest of the schools and the interest of the students. He saw that the claims of the parties must be reconciled so as to "prevent either from destroying the other." *Gobitis*, 310 U.S. at 594. Because the liberty of conscience is so fundamental, "every possible leeway" must be given to the claims of religious faith. *Id*. On the other hand, Justice Frankfurter stated, similarly to what Defendants in this cause argue, that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id*. at 594-95. However, such conclusions were ultimately overthrown in *Barnette*, and as such this Court should reject any similar

However, in just three short years, the Court entirely shifted course and reversed itself. In *West Virginia State Board of Education v. Barnette*, the Court considered another public school policy requiring students to recite the pledge against their religious convictions. 319 U.S. 624 (1943). The majority opinion stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein…. We think the action of the local authorities in compelling the flag statute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the *First Amendment to our Constitution* to reserve from all official control."

Id. at 642 (emphasis in original). In other words, the Court ruled it unconstitutional to force public school children to perform an act that was against their religious beliefs. The Court also stated, "[F]reedom to differ is not limited to things that do not matter much…. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id*.[19]

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arguments that "religious convictions which contradict the relevant concerns of a political society" must submit to an overreaching authority.

[19] "The very purpose of a *Bill of Rights* was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's … freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638 (emphasis in original). This language tracks language quoted herein by Thomas Jefferson. *See* Part I.A, *supra*.

Barnette has been affirmed on numerous occasions, including in *Casey*. *Casey*, 505 U.S. at 851. *Casey* stated:

> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. *That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty*. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, *we have ruled that a State may not compel or enforce one view or the other*.

Id. (citing *Barnette*, 319 U.S. 624) (other citations omitted) (emphasis added).

To force parents and children to choose between their religion and their public education was a clear violation of the plaintiffs' first amendment rights. Likewise, forcing pharmacists and pharmacies to choose between their religious, moral, or conscientious convictions and their livelihood is an unconstitutional extension of state power.

In the 1960s and 1970s, the Court continued to protect the freedom of conscience of the American public—but this time in the form of protecting men who were conscientiously opposed war. Section 6(j)[20] of the Universal Military Training and Service Act contained a conscience clause exempting men from the draft who were conscientiously opposed to military service due to "religious

[20] Section 6(j) was not a "new" idea or exemption. Early colonial charters and state constitutions spoke of freedom of conscience as a right, and during the Revolutionary War, many states granted exemptions from conscription to Quakers, Mennonites, and others with religious beliefs against war.

training and belief." In *United States v. Seeger* and *Welsh v. United States*, the Court extended draft exemptions to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war." *Welsh*, 398 U.S. 333, 344 (1970) (affirming *Seeger*, 380 U.S. 163 (1965)).

Welsh acknowledged that § 6(j) protected persons with "intensely personal" convictions—even when other persons found those convictions "incomprehensible" or "incorrect." *Welsh*, 398 U.S. at 339. Like Seeger, Welsh "held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice." *Id*. at 337. Important here is Welsh's statement:

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being…. I cannot, therefore conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.

Id. at 343 (quoting Welsh).

While the draft cases were related to a statutory exemption not at issue here, the holdings of these cases demonstrate the strong commitment to freedom of conscience in this nation. It cannot be disputed that there is a "war" currently waging in our country over abortion. As already mentioned, the Court has acknowledged that men and women of good conscience may resolve the question

differently. *Casey*, 505 U.S. at 850. Forcing Plaintiffs to dispense emergency contraception against their wills is paramount to forcing them to become an "instrument of war"—and an instrument of death, according to their religious tenets.

Like Welsh, Plaintiffs believe that human life is valuable—at all stages and in all situations. They cannot injure or kill another human being. As is discussed in Part II, *infra*, emergency contraception has the potential to terminate unborn children. Even though Defendants believe Plaintiffs' beliefs are "incomprehensible" or "incorrect," the State simply cannot require that Plaintiffs assume duties that they believe are immoral.

Just one year after *Welsh*, the Court stated the following in a case requiring bar applicants to make certain statements about their personal beliefs:

> And we have made it clear that: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The *First Amendment* gives freedom of mind the same security as freedom of conscience."

Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971) (emphasis in the original). Indeed, "freedom of conscience" is referenced explicitly throughout Supreme Court jurisprudence. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (specifically referencing "constitutionally protected freedom of conscience").

Since 1990, the Supreme Court has abided by the following principles in deciding free exercise cases. A state law designed to discriminate against an individual because of his or her religious beliefs and practices is subject to strict scrutiny. Thus, the state must show that the law serves a compelling interest and is narrowly tailored to meet that interest. When a law is religiously neutral and of general applicability, it is not subject to strict scrutiny, even if it affects an individual's religious beliefs or practices. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). However,

> [o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against government hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

Thus, there is a two-part process under federal law. First, a court must initially look at the face of a rule. *See Menges v. Blagojevich*, 451 F. Supp. 2d 992, 999 (C.D. Ill. 2006). Second, if the rule is facially neutral, the court must go beyond the face of the rule to determine the true object of the rule. *Id*. at 1000.[21]

[21] In denying a motion to dismiss in a separate but related lawsuit in the Central District of Illinois, that court concluded that the plaintiffs alleged facts which

Furthermore, the Court has specifically affirmed conscience in its abortion jurisprudence. *See Casey*, 505 U.S. at 850-51.

Wash. Admin. Code §§ 246-863-095 and 246-869-010, as adopted by the Washington State Board of Pharmacy (Board), contain no reference to religion, therefore taking the Board's actions over the first free exercise hurdle. The second hurdle poses a significant problem for the Defendants, however. The facts of this case demonstrate that §§ 246-863-095 and 246-869-010 were directed toward pharmacists and pharmacies that objected to the dispensing of abortifacient contraception.

Defendants cannot get around the indisputable facts of this case. On June 1, 2006, the Board unanimously voted to pursue a draft rule that allowed pharmacists to refuse to dispense a medication. *Stormans, Inc. v. Selecky*, 2007 U.S. Dist. LEXIS 85534, *10 (W.D. Wash. Nov. 8, 2007). Later that day, Governor Gregoire sent a letter to the Board stating her opposition to the draft rule, specifically that prescriptions should not be denied based upon personal, religious, or moral objections. *Id*. She would not allow any accommodations for pharmacists. At a press conference, the Governor threatened to remove the entire Board. *Id*.

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would demonstrate that the subject rule violated the free exercise of Illinois pharmacists. *See generally Menges*, 451 F. Supp. 2d 992.

On August 28, 2006, Governor Gregoire submitted a new rule to the Board, which ultimately became the administrative regulations at issue in this case. Her rule requires pharmacists to dispense all prescribed drugs and prevents them from refusing to dispense a prescription for religious or moral reasons. *Id*. at **10-11. On April 2, 2006, the Board unanimously voted to accept wording of the governor. *Id*. at *11. Thus, the following was the chain of events: unanimous approval of a rule accommodating pharmacists; threats by the Governor that the Board should not allow for religious accommodation; and a unanimous reversal by the Board to accept the Governor's language violative of the pharmacists' freedom of conscience. There is no question that the regulations are aimed at pharmacists' religious and moral beliefs.

In addition, the regulations do not cover hospitals and emergency rooms, which demonstrates that the object of the regulations is not to make emergency contraception more readily available, but to specifically target pharmacists and pharmacies objecting to emergency contraception. The regulations also exempt some pharmacists for religious reasons, but only those pharmacists who are working with another pharmacist. *Id*. at *16. Thus, the regulations are not generally applicable.

Each of these facts demonstrates that the regulations were promulgated to target religious conduct for distinctive treatment.[22] *See Church of Lukumi Babalu Aye*, 508 U.S. at 534. As such, it is subject to strict scrutiny. Because the purpose of the regulations was to guarantee access to emergency contraception by forcing pharmacists and pharmacies to comply, and because the regulations do not target other sources of prescription drugs, it is not narrowly tailored and must be struck as a violation of Plaintiffs' free exercise rights. The vast history of Supreme Court jurisprudence affirming freedom of conscience, discussed herein, supports such a conclusion.

C. Freedom of Conscience is a Fundamental Right Affirmed by State and Federal Statutes—Including WASH. REV. CODE § 9.02.150

In addition to the protections provided by the First Amendment, as discussed in Part I.B, *supra*, state and federal legislatures have taken further steps to ensure that freedom of conscience is fully engrained in American society.

i. WASH. REV. CODE § 9.02.150

Forty-seven states provide some degree of protection to healthcare providers who conscientiously object to certain procedures.[23] Thus, contrary to the claims of

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[22] These facts are further discussed in the Appellee's brief, as well as in the A*micus Curiae* brief of the American Center for Law and Justice, et al.

[23] *See Rights of Conscience: A Summary of State Laws Protecting Healthcare Providers and Institutions* (2008), available at http://www.aul.org/ROC_Summary_Chart (last visited Apr. 2, 2008).

Defendants and their supporting *amici*, the ***common trend is to protect healthcare providers***—not to require healthcare providers to perform services contrary to their consciences.

Included in this list of 47 states is the State of Washington. In fact, WASH. REV. CODE § 9.02.150 is one of the more comprehensive freedom of conscience statutes in the nation. This provision states:

> No person or private medical facility may be required by law or contract in any circumstances to participate in the performance of an abortion if such person or private medical facility objects to so doing. No person may be discriminated against in employment or professional privileges because of the person's participation or refusal to participate in the termination of a pregnancy.

Id.

Important here is the legislature's use of the word "person." It is not limited to physicians or nurses. Instead, it applies to any person within the State of Washington. Thus, it also applies to pharmacists.

Also significant is the use of the phrase "or private medical facility"—meaning it applies not only to individuals, but also to private corporations. As such, § 9.02.150 can be read as stating, ***"No pharmacist or pharmacy… may be required by law or contract… to participate in the performance of an abortion… [nor] be discriminated against in … professional privileges…."***

Under the Code, "abortion" is defined as "any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth." WASH. REV. CODE § 9.02.170(2). As is demonstrated in Part II, *infra*, both the Food and Drug Administration (FDA) and the manufacturer of Plan B acknowledge that emergency contraception has the abortifacient quality of preventing a fertilized embryo—*i.e.*, conception has occurred—from attaching to the wall of the uterus. Thus, the protection afforded in § 9.02.150 applies to the prescription or dispensing of emergency contraception.

Defendants and their *amici* ignore the conscience protections afforded to all persons under § 9.02.150. Rather than addressing the subject on its head, the Talmadge Brief only discusses insurance provisions—attempting to deceive this Court into believing that the only conscience protections afforded in Washington are in insurance regulations. This is simply not true.[24] All persons and private entities in the State of Washington are protected from participating in abortion; and emergency contraceptives have an abortifacient mechanism—placing the

[24] Even if it were true, all Defendants and their supporting *amici* have done is demonstrate a deep-seeded commitment by the State of Washington to the protection of freedom of conscience. As the Talmadge Brief recognizes, the insurance statutes "struck a balance" to "accommodate the recognized competing individual rights." Talmadge Brief, at 14. Contrast this to Wash. Admin Code §§ 246-863-095 and 246-869-010, which afford no accommodation whatsoever.

conscientious objection to such provision under the ambit of § 9.02.150. *See* Part II, *infra*.

Defendants may argue that "pregnancy" under the Code is defined as beginning after implantation of an embryo. What matters here, however, is that Plaintiffs believe that pregnancy begins at conception—a belief held my millions of individuals in this nation. *See* Part II, *infra*. Simply because the state defines pregnancy as beginning at one point does not preclude Plaintiffs from believing that it begins at an earlier point. Because Plaintiffs believe that life begins at conception, and because the FDA and manufacturer have admitted that emergency contraception prevents a conceived embryo from attaching to the uterine wall, emergency contraception can be classified as an abortifacient and falls under § 9.02.150. For more on this matter, *see* Part II, *infra*.

The comprehensive protection of WASH. REV. CODE § 9.02.150 will be drastically compromised if Defendants succeed in forcing pharmacists—just one subgroup of healthcare providers—to provide abortifacients contrary their conscientious objections. Once the protection of pharmacists has been breached, the freedom of conscience of all healthcare providers will be at risk.[25]

[25] Moreover, this breach is not related solely to abortion. Should Ballot Initiative 1000 pass in Washington this November, pharmacists will also be forced to provide life-ending drugs to terminally-ill persons. The lower court simply must be affirmed in this case to prevent such constitutional violations of healthcare providers' rights.

ii. Federal Statutes

In addition to the First Amendment and Title VII,[26] which are briefed by the Appellees as well as other *amici*, the federal government has passed a number of measures that protect Americans' freedom of conscience. The most recent and comprehensive measure is the Hyde-Weldon Amendment. Pub. L. No. 109-149, 119 Stat. 2833, 2879-80 (renewed at Pub. L. 110-5, 121 Stat. 8). This provision protects healthcare providers against forced participation in abortion contingent upon reception of federal funding. Many similar conscience provisions related to federal funding have been passed over the last 35 years. *See*, *e.g.*, 42 U.S.C. § 300a-7(b), (c)(1) (1973); 42 U.S.C. § 300a-7(c)(2), (d) (1974); 42 U.S.C. § 300a-7(e) (1979); 42 U.S.C. § 238n (1996); 42 U.S.C. § 1395w-22(j)(3)(B) (1997); 42 C.F.R. § 1609.7001(c)(7) (1998); Pub. L. No. 108-25, 117 Stat. 711, at 733 (2003).

In addition, the U.S. Code also protects employees from forced participation in federal executions or prosecutions—arguably similar to the forced participation in life-ending contraceptives. 18 U.S.C. § 3597(b) (1994).

Congress has also legislated in the area of contraceptives. In fact, in 2000, Congress passed a law requiring the District of Columbia to include a conscience

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[26] As this Court is well aware, Title VII of the Civil Rights Act requires employers generally to accommodate the religious beliefs of their employees that do not cause undue hardship.

clause in any contraceptive mandate, protecting religious beliefs and moral convictions. *See* Title III, § 127 of Division C (D.C. Appropriations) of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 126-27 (2000). In 1999, Congress prohibited health plans participating in the federal employees' benefits program from discriminating against individuals who refuse to prescribe contraceptives. *See* Title VI, § 635(c) of Division J (Treasury and General Government Appropriations) of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 472 (1999).

While these laws are not directly applicable to the Plaintiffs in this case, they do demonstrate the deeply-held desire of the American people to protect healthcare providers from requirements forcing them to choose between their religious tenets and their livelihoods.

D. Freedom of Conscience is a Fundamental Right Affirmed by National and International Medical Organizations

National and international medical organizations also affirm healthcare providers' freedom to abide by their consciences, including their religious and moral beliefs. Most relevant here, the American Pharmaceutical Association (APhA) states in its *Code of Ethics* that pharmacists should avoid any behavior that compromises their "dedication to the best interests of the patients," but also holds that pharmacists have a duty to "act with conviction of conscience." APhA, *Code*

of Ethics for Pharmacists (adopted 1994).[27] In its *Pharmacist Conscience Clause*, APhA states:

> 1. APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.
> 2. APhA shall appoint a council on an as needed basis to serve as a resource for the profession in addressing and understanding ethical issues.

APhA, *Pharmacist Conscience Clause*, in *2004 Action of the APhA House of Delegates* 6 (2004).

Likewise, the policy of the American Society of Health-System Pharmacists (ASHP) recognizes "the right of pharmacists … to decline to participate in therapies they consider to be morally, religiously, or ethically troubling." ASHP, *Pharmacist's Right of Conscience and Patient's Right of Access to Therapy*.[28]

Analogously, leading professional physicians' organizations have consistently held that physicians should be free to determine which procedures they will perform, in what type of practice they will engage, and what patients they

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[27] *Available at* http://www.pharmacist.com/AM/Template.cfm?Section=Practice_Resources&CONTENTID=2903&TEMPLATE=/CM/HTMLDisplay.cfm (last visited Apr. 2, 2008).

[28] *Available at* http://www.ashp.org/s_ashp/bin.asp?CID=6&DID=4011&DOC=FILE.PDF (last visited Apr. 2, 2008).

will serve. The American Medical Association (AMA) provides that, with the exception of medical emergencies, a physician shall "be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care." AMA, *Principles of Medical Ethics* (adopted 2001, updated 2006).[29]

In E-9.06 of the AMA's *Code of Medical Ethics* (Code), the AMA provides that every individual has "free choice" of which physician to use. However, "[i]n choosing to subscribe to a health maintenance organization or in choosing or accepting treatment in a particular hospital, the patient is thereby accepting limitations upon free choice of medical services." *See* AMA, *Code of Medical Ethics* (2005).[30] Similarly, a patient has free choice in selecting a pharmacy, but that patient is accepting the limitations that come along with that particular pharmacy.

E-9.06 continues by stating, "[a]lthough the concept of free choice assures that an individual can generally choose a physician, likewise a physician may decline to accept that individual as a patient." *Id*. Thus, the Code is replete with guidelines allowing physicians to refuse to treat certain persons. E.906 even takes into account differences in insurance coverage, stating, "[i]n selecting the

[29] *Available at* http://www.ama-assn.org/ama/pub/category/2512.html (last visited Apr. 2, 2008).

[30] *Available at* http://www.ama-assn.org/apps/pf_new/pf_online (last visited Apr. 2, 2008).

physician of choice, the patient may sometimes be obliged to pay for medical services which might otherwise be paid by a third party." *Id.* Thus, the AMA places the responsibility of choosing the appropriate healthcare provider on the patient's shoulders, regardless of the financial obstacles for the patient.

In the World Medical Association's (WMA) *Statement on Professional Responsibility for Standards of Medical Care*, the organization recognizes that a "physician should be free to make clinical and ethical judgements [sic] without inappropriate outside interference." WMA, *Statement on Professional Responsibility for Standards of Medical Care* (2006).[31] Likewise, pharmacists should be free to make ethical decisions for their practice without inappropriate interference from outside the medical profession. WMA's statement goes on to affirm that "[p]rofessional autonomy and the duty to engage in vigilant self-regulation are essential requirements for high quality care" which benefit patients. *Id.*

What these organizational statements demonstrate is that the medical field stands behind the conscience rights of its providers. Plaintiffs' claims are not out of the ordinary; to the contrary, Plaintiffs' claims are supported by the very protections encouraged by national and international medical organizations.

[31] *Available at* http://www.wma.net/e/policy/m8.htm (last visited Apr. 2, 2008).

II. THE ABORTIFACIENT EFFECT OF EMERGENCY CONTRACEPTION IS OBJECTIONABLE TO A LARGE NUMBER OF HEALTHCARE PROVIDERS AND PROVIDES GROUND FOR THE CONSCIENTIOUS OBJECTION TO ITS PROVISION

The Defendants and other proponents of the widespread use of emergency contraception take great strides to downplay the effects of emergency contraception (EC) and its implications on the beliefs of a large number of the nation's citizens. Such proponents paint a picture that individuals opposed to EC are a radical minority and are out of touch with the true nature of EC, claiming that EC does not terminate pregnancy, but "prevents" pregnancy.

Yet the very explanation by the FDA demonstrates that the Plaintiffs are not exaggerating the effects of EC:

> Plan B works like other birth control pills to prevent pregnancy. Plan B acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). ***If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation).***

FDA, *FDA's Decision Regarding Plan B: Questions and Answers* (updated Aug. 24, 2006) (emphasis added).[32]

The ***same explanation is provided in the Plan B label***, authored by the drug company itself, detailing to consumers that EC either 1) stops the release of the egg from the ovary; 2) prevents fertilization of an egg; or 3) prevents "it" [a fertilized

[32] *Available at* http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm (last visited Apr. 2, 2008).

egg] from attaching to the uterus. Barr Pharmaceuticals, Inc., *How Plan B Works* (2007).[33]

When describing the first two mechanisms of action, the drug label is specific in labeling the egg, ovary, etc. Yet when detailing the fertilized egg, the label simply refers to the fertilized egg as "it" rather than forthrightly explaining that the label is discussing a *fertilized* egg that will be prevented from implanting. In other words, the label downplays that ***conception has occurred***.

What all of this really comes down to is the definition of pregnancy, and whether an individual views pregnancy as beginning at fertilization (conception) or after implantation. For example, the American College of Obstetricians and Gynecologists defines pregnancy as beginning when a fertilized egg is implanted in the lining of the uterus. Yet this is a ***clear distortion of traditional embryologic teaching***. The *Langman's Medical Embryology* medical textbook defines pregnancy as beginning at fertilization of the egg by the sperm; *Stedman's Medical Dictionary* defines pregnancy as the period of development "from conception until birth." Patrick O'Brian & Thomas W. Sadler, *Langman's Medical Embryology* 117 (Lippincott et al., eds. 2004); *Stedman's Medical Dictionary* (Houghton Mifflin Co. 2002).

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[33] *Available at* http://www.go2planb.com/ForConsumers/AboutPlanB/HowItWorks.aspx (last visited Apr. 2, 2008).

What is important here, however, is that the Plaintiffs' religious beliefs hold that the life of a human being begins at conception—not implantation—and they cannot dispense EC because the drug may prevent an already-fertilized egg from implanting in the uterus. And Plaintiffs are not alone in their beliefs. Being complicit in causing this abortifacient effect is morally objectionable for many Americans. For example, the Catholic Church—which in 2006 was comprised of 69.1 million Americans, or 23 percent of the U.S. population[34]—teaches that the life of each human being begins at the moment of conception. *Catechism of the Catholic Church* ¶ 2322 (2d ed. 1997).[35] Numerous Protestant denominations as well as other religions echo this belief.

In *Casey*, the Court stated that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. While the Plaintiffs have a right to define their own concept of the "mystery of human life," that liberty is lost if they are then forced, contrary to their beliefs, to participate in the taking of what they believe to be human life.

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[34] Catholic Information Project, *The Catholic Church in America: Meeting Real Needs in Your Neighborhood* 3 (USCCB 2006), *available at* http://www.usccb.org/comm/2006CIPFinal.pdf (last visited Apr. 2, 2008).

[35] While Defendants and members of this Court may disagree with Catholic beliefs, the Supreme Court has referenced the Roman Catholic belief system as an "honestly held religious faith." *Cantwell*, 310 U.S. at 309.

In summary, emergency contraception undisputedly possesses an abortifacient effect that is objectionable to a large number of healthcare providers nationwide. To require that the Plaintiffs provide EC clearly conflicts with their sincerely held religious beliefs that preventing a fertilized egg from implanting is terminating a human life. Plaintiffs simply cannot be forced to perform a service that is against their moral, religious, or conscientious beliefs. Requiring so would be a degradation of this nation's history and tradition, as well as a contravention of United States Supreme Court jurisprudence and WASH. REV. CODE § 9.02.150.

CONCLUSION

The decision of the Western District Court of Washington should be affirmed.

Respectfully Submitted,

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This _____ day of April, 2008.

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 05-16971

I certify that: (check appropriate options)

(Options 1 through 3 removed as inapplicable)

__X__ **4. Amicus Briefs**

_X_ Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached *amicus curiae* brief is proportionally spaced, has a typeface of 14 points or more, and contains 7,000 words or less (specifically, this brief contains 6,901 words, including headings and footnotes),

or is

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_____

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PROOF OF SERVICE

I hereby certify that on April _____, 2008, I served two paper copies of the foregoing Brief of *Amici Curiae* to counsel listed below by depositing said copies in U.S.P.S. first-class mail, postage paid.

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The original and fifteen copies of the foregoing brief were sent via Federal Express to the Ninth Circuit at the following address: Ms. Molly Dwyer, Acting Clerk of Court, U.S. Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, CA 94103-1526 (Telephone: 415.355.8000).

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